B.C.D. 02-32

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EMPLOYER STATUS DETERMINATION
Delaware Otsego Corporation

This is the determination of the Railroad Retirement Board of the employer status of Delaware Otsego Corporation (DOC) as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA).

Legal Opinion L-81-23, issued November 19, 1981, found that DOC was under common control with rail carriers because it had five rail subsidiaries,[1] but that it was not an employer because it performed no services for its subsidiaries. An audit of a separate company, the Toledo, Peoria and Western Railway Corporation (B.A. 2346), completed in November 2000, indicated that there had been significant changes in the operations and ownership of DOC.

DOC was a publicly held company until October 4, 1997, when Walter G. Rich purchased 80 percent of its common stock and the Norfolk Southern Corporation and CSX Transportation acquired ten percent each. At the time of the stock purchase, DOC had a substantial interest in the Toledo, Peoria, and wholly owned the New York, Susquehanna and Western Railway (B.A. No. 3251). DOC sold its interest in the Toledo, Peoria to Rail America Services Corporation effective August 31, 1999.

The Toledo, Peoria and DOC entered into an "Administrative Services Agreement" on January 31, 1996, under which DOC agreed to function as the agent of the Toledo, Peoria to supervise and manage the operation and maintenance of the Toledo, Peoria rail properties. DOC's services under that Agreement included performance of the following duties: the supervision of all railroad operations on rail properties; the supervision of the maintenance of rail properties; employment of personnel as might be required for the proper operation and maintenance of rail properties, including payment of salaries, wages, payroll taxes, premiums and charges for insurance, etc., and including the discharge and other disciplining of personnel; the incurring and payment of all charges and operating expenses of rail

[1] The five rail subsidiaries were: (1) the New York, Susquehanna and Western Railroad Corporation, (2) Cooperstown and Charlotte Valley Railway Corporation, (3) the Fonda, Johnstown & Gloversville Railroad Company, (4) the Central New York Railroad Corporation, and (5) the Lackawaxen and Stourbridge Railroad Corporation.

properties; the billing and collecting of all charges for transportation services, rents, fees, and other amounts due the Toledo Peoria, and the negotiation and execution of leases and licenses and other agreements. As of September 15, 1999, DOC employed 94 individuals, of whom 26 performed services for the Toledo, Peoria.

A representative of DOC advised that DOC employees also perform administrative services for the New York, Susquehanna. Approximately 94 percent of DOC's operating revenue derived from Toledo, Peoria and New York, Susquehanna. Services, which DOC employees perform for the New York, Susquehanna include accounting, payroll, legal and other services.

Four of the five officers of DOC are also officers of the New York, Susquehanna[2]; three of the five officers of DOC are directors of the New York, Susquehanna[3]; and one director of DOC is a director of the New York, Susquehanna[4]. Until the October 4, 1997 transaction, Mr. Rich was the President and Chief Executive Officer of DOC and the Toledo, Peoria, which also had a number of other officers in common.

Section 1(a)(1) of the RRA defines an "employer" to include:

> (i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49;
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> (ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the

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2 Walter Rich, Joseph Senchyshyn, Nathan Fenno, and Tabetha Rathbone.
3 Walter Rich, Joseph Senchyshyn, and Nathan Fenno,
4 Walter Rich.

> transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad. [45 U.S.C. § 231(a)(1)(i) and (ii)].

As mentioned above, on November 18, 1981, DOC was found to be under common control with rail carriers, but was found not to be an employer because it performed no services for its subsidiaries. However, three significant events occurred after that date. First, DOC entered into the administrative services agreement with the Toledo, Peoria in 1996. Second, Walter Rich purchased a majority of shares of DOC in 1997. Third, the D.C. Circuit Court of Appeals issued its decision defining "under common control" in the Union Pacific case. Union Pacific Corporation v. United States, 5 F.3d 523 (Fed Cir. 1993).

In examining the relationship between DOC and Toledo, Peoria, the record indicates that on January 31, 1996, these two companies entered an agreement under which DOC agreed to function as the agent of the Toledo, Peoria. Essentially, the contract with the Toledo, Peoria provided for DOC to run its rail operation. The Board concludes that DOC became a covered employer under the Acts effective January 31, 1996 because as of that date, DOC took on the job of running the Toledo, Peoria rail carrier operation.

DOC sold its interests and discontinued its administrative agreement with Toledo, Peoria on August 31, 1999. Therefore, we need to examine the relationship between DOC and its subsidiary New York, Susquehanna to determine if DOC remains covered under the Acts.

The majority of the Board has previously held that a holding company will not be under common control with its subsidiary based the Union Pacific case, a 1993 decision of the United States Court of Appeals for the Federal Circuit. The Court held, regarding a claim for refund of taxes under the Railroad Retirement Tax Act, that a parent corporation which owns a rail carrier subsidiary is not under common control with the subsidiary within the meaning of §3231 of the Act. Union Pacific, 5 F.3d 523 (Fed Cir. 1993). The Court wrote that, "The term 'under common control' does not usually apply to two companies in a parent-subsidiary relationship." Union Pacific, 5 F.3d at 525.

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Applying the Union Pacific decision, a majority of the Board would find DOC not to be under common control with its subsidiary prior to October 4, 1997. However, beginning on that date, eighty percent of DOC was purchased by Walter G. Rich. Walter Rich controlled the parent corporation, DOC, and was also President of the subsidiary railroad, New York, Susquehanna. Unlike the Union Pacific case, the ownership of the DOC was not diversified, since a single shareholder owned a majority of the shares of the parent corporation.

Section 202.5 of the Board's regulations defines "common control" as follows:

> A company or person is under common control with a carrier, whenever the control (as the term is used in §202.4) of such company or person is in the same person, persons, or company as that by which such carrier is controlled. (20 CFR §202.5)

Section 202.4 of the Board regulations defines control as follows:

> A company or person is controlled by one or more carriers, whenever there exists in one or more such carriers the right or power by any means, method or circumstance, irrespective of stock ownership to direct either directly or indirectly, the policies and business of such a company or person and in any case in which a carrier is in fact exercising direction of the policies and business of such a company or person. (20 CFR §202.4).

The Union Pacific decision held that the existence of common officers or directors between the parent and subsidiary would not render the parent to be under common control with the subsidiary. See, Union Pacific at P.526. The Court noted that officers and directors serve "the shareholders of the corporate entity or as authorized by the corporate charter". The Court concluded, "the shared individuals within the leadership of these separate corporations do not make the Corporation an employer under Section 3231 (a)". However, the Court was considering a publicly traded entity with a very diversified share ownership. The instant case presents different factual circumstances.

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DOC was a publicly held company until October 4, 1997. There is no evidence that a majority of ownership was concentrated in anyone shareholder or entity. However, after October 4, 1997, Walter G. Rich owned 80% of the shares of DOC. The New York, Susquehanna, in turn, is wholly-owned by DOC. Furthermore, Walter Rich was President and director of the subsidiary railroad, New York, Susquehanna. Therefore the Board finds that DOC and New York Susquehanna have been under common control within the meaning of that phrase in the Board's regulations since October 4, 1997.

The record in this case indicates that DOC provides substantial services for the New York, Susquehanna. Accordingly, the Board finds that when DOC ceased to operate the Toledo, Peoria at the time it sold its interest in that company on August 31, 1999, DOC nevertheless remained an employer under the Acts because it was under common control with a carrier for which it performed substantial services.

For the reasons explained above, the Board holds that DOC became an employer under the RRA and the RUIA effective January 31, 1996.

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